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No. 88-319

In The

Supreme Court of the United States

October Term, 1988

THORNBURY TOWNSHIP
and JOHN G. COPELAND, JR.,

Petitioners,

vs.

W.D.D., INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where on appeal from denial of a Motion for Summary Judgment a panel of the Court of Appeals had requested briefs on the issue of appellate jurisdiction and, subsequently, after consideration of the briefs, dismissed the appeal for lack of jurisdiction, was the Court of Appeals en banc correct in dismissing a second appeal – from the same District Court order that was the basis for the first appeal?

Was the Court of Appeals en banc correct in holding that the Petitioner Township was not entitled to argue that it was entitled to immunity from suit pursuant to 42 U.S.C. 1983, where the Petitioner Township failed to claim immunity from suit in its Motion for Summary Judgment to the District Court?

Should the Supreme Court conduct appellate review of a panel decision of the Third Circuit Court of Appeals which has been specifically vacated by that Court en banc?

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THORNBURY TOWNSHIP
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OTHER OPINIONS

In addition to seeking relief pursuant to 42 U.S.C. §1983 for Petitioners' interference with their due process constitutional rights in the land development process, Respondent has been pursuing its land development approvals through the Pennsylvania state court system. Some of the findings and holdings in the state court decisions bear on the conduct of Thornbury Township and John G. Copeland, Jr., and the due process issues. Attached to the Appendix are the relevant opinions of both the Pennsylvania trial court (Appendix "A") and

appellate court (Appendix "B") which have had occasion to examine the activities and conduct of both Thornbury Township and John G. Copeland, Jr. in connection with Respondent's land development application.

STATEMENT OF THE CASE

On June 18, 1986, Respondent, W.D.D. Inc., filed a Complaint in Pennsylvania state court in the instant matter alleging that the Petitioners, Thornbury Township and John G. Copeland, Jr., under color of law, violated Respondent's civil rights by their continuing intimidation, harassment and interference with Respondent's attempt to obtain the requisite administrative approval to develop a 164-acre parcel of property in Thornbury Township, Chester County, Pennsylvania into two-acre single family lots. Petitioners removed the matter to Federal Court.

As both the District Court and Court of Appeals have recognized, Respondent does not assert that the Township's land use regulations are, in and of themselves, so stringent as to constitute a constitutional deprivation of property rights. Rather, Respondent claims that the actions of the Township governing body and John G. Copeland, Jr. in their handling of Respondent's land development application constituted an unbridled deprivation of Respondent's civil rights.

The factual allegations of Respondent's Complaint (which have virtually all been admitted in the Answer to the Complaint) portray a municipal governing body gone

awry, due in large part to the activities of one of its supervisors, John G. Copeland, Jr. The complained-of activities include *inter alia*:

1. The Township opposing Respondent's land development plan in court proceedings and elsewhere after the Township had directed Respondent to draft that very plan and had voted to support it. After Respondent made the changes to its land development plan, as directed by the Township, the Township, by and through the direction of John G. Copeland, Jr., who was personally opposed to the plan and who had been recently elected to the Board of Supervisors, began to take various actions to intimidate, harass and interfere with Respondent's ability to proceed with the very plan which the Township had earlier voted to support and upon which vote, Respondent had substantially relied to its detriment.

2. Township supervisor, John G. Copeland, Jr., using Township police in an act of intimidation and harassment in delivering written notice to the Respondent that the Township had denied its land development application when in fact no such action had ever been taken by the Township governing body.

3. Township supervisor, John G. Copeland, Jr., refusing to remove himself from participating in his quasi-judicial capacity as a Township supervisor sitting in judgment of Respondent's land development application when he had retained counsel in his individual capacity to oppose the application.

4. Petitioners refusing to make available or accessible information on Respondent's land development application to another Township supervisor who had consistently expressed his outrage at the Township's and John G. Copeland, Jr.'s handling of Respondent's land development application.

5. Petitioners voting to have the Township appear as a party in opposition to the numerous lawsuits and appeals which Respondent was forced to bring in state court to obtain land development approval of a plan which the Township itself had directed Respondent to draft and had earlier voted to support.

Given these allegations, both the District Court and Court of Appeals quite properly recognized Respondent's claim as one which did not challenge either Township or state land development regulations but rather the conduct of the Township governing body and one of its supervisors regarding their handling of Respondent's land development application.

As noted earlier, Respondent has been forced to bring numerous state court actions to seek approval of its land development plans. Both the state trial court and state appellate court which have had occasion to review the propriety of Petitioners' activities in connection with this matter, have commented respectively that Petitioner Copeland's conduct in this matter has been "uniquely egregious" (see Appendix "A") and that his conduct "evidenced a greater appearance of bias, if not actual bias, toward W.D.D.'s application for subdivision approval (than another case previously determined by

the same court in which substantial bias had been found.)" (See Appendix "B").

Petitioners in the instant Petition do not allege that their conduct as described by Respondent does not constitute a denial of Respondent's civil rights, but rather that the Court of Appeals made an improper determination regarding an issue of appellate jurisdiction.

After having lost their Motion for Summary Judgment in the District Court, Petitioners filed both a Motion for Reconsideration of said denial with the District Court as well as a Notice of Appeal to the Court of Appeals. The "first panel" of the Court of Appeals to address the appeal realized that there was a question of appellate jurisdiction in the case, and asked counsel for both parties to brief this particular issue. Petitioners' counsel argued vigorously that the Court of Appeals had jurisdiction to hear the appeal. The first panel of the Court of Appeals determined that it did not have jurisdiction to hear the appeal and dismissed Petitioners' appeal. (See Petitioners' Appendix, p. 36a). Petitioners then requested rehearing en banc of the first panel's decision but the request was denied. (See Petitioners' Appendix, p. 34a).

After the District Court denied Petitioners' Motion for Reconsideration, Petitioners then filed a second appeal with the Court of Appeals from the denial of the Motion for Reconsideration. The "second panel" of the Court of Appeals erroneously proceeded to consider Petitioners' appeal notwithstanding the first panel's determination that it lacked appellate jurisdiction to hear the matter. The second panel issued a decision pursuant to

Petitioners' second appeal on February 8, 1988. (See Petitioners' Appendix, p. 4a). However, when the Court of Appeals en banc realized the error of the second panel, it immediately vacated the second panel's decision on March 31, 1988 and ordered argument before the Court en banc. (See Appendix "C"). The Court of Appeals en banc, after oral argument, dismissed Petitioners' appeal. (See Petitioners' Appendix, p. 1a).

Now, in the instant appeal, Petitioners seek to have this Court review not only the issue of appellate jurisdiction, but also to make a *de novo* determination on issues which Petitioners failed to raise before the District Court in both their Motion for Summary Judgment and Motion for Reconsideration of the District Court's Order. The Petitioner Township attempts to have this Court reverse the holding of *Owen v. City of Independence*, 445 U.S. 622 (1980) regarding a municipal body's inability to raise a qualified immunity defense notwithstanding the fact that Petitioner failed to raise said defense in its Motion for Summary Judgment and subsequent Motion for Reconsideration before the District Court.

REASONS FOR DISALLOWANCE OF THE WRIT

1. The Petition for Writ of Certiorari of Thornbury Township and John G. Copeland, Jr. Should Be Denied Because Petitioners, In Contravention Of The "Law Of The Case" Doctrine, Sought Multiple Determinations By The Court Of Appeals On The Issue Of Appellate Jurisdiction.

Petitioners seek to have this Court review, and overturn, the en banc decision of the Court of Appeals dismissing Petitioners' appeal from the District Court's

decision denying the Petitioners' Motion for Summary Judgment. As the preceding sentence suggests, the procedural history of this case is convoluted, to say the least. It is convoluted because Petitioners, in contravention of the "law of the case" doctrine, sought multiple determinations by the Court of Appeals on the issue of appellate jurisdiction. Both appeals were brought from the same District Court Order – the denial of Petitioners' Motion for Summary Judgment.[1] After losing once on the issue of appellate jurisdiction before one panel, Petitioners filed a second Notice of Appeal that was considered by a second (but different) panel of the Court of Appeals. The second panel, contrary to the first panel, concluded that there was appellate jurisdiction. A request by Respondent for reconsideration by the Court of Appeals en banc led to an immediate vacation of the erroneous second panel decision and a rehearing en banc on the entire issue. (See Appendix "C").

After rehearing en banc, the Court of Appeal, then, correctly dismissed Petitioners' appeal.

Petitioners attempted to set forth the complex procedural history of this case in their Petition (pp. 4-7). Respondent believes, however, that this procedural history can be made more clear through the following chronology:

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[1] Petitioners acknowledge that their second appeal, though technically an appeal from the District Court's denial of their Motion for Reconsideration, should be treated as an appeal of the District Court's denial of their Motion for Summary Judgment. (See Pet. for Cert., pp. 8,9).

March 19, 1987	-	District Court denies Petitioners' Motion for Summary Judgment.
March 30, 1987	-	Petitioners file Motion for Reconsideration of District Court's denial of Defendants' Motion for Summary Judgment.
April 10, 1987	-	Petitioners file Notice of Appeal #1.
April 16, 1987	-	First panel (of Court of Appeals) asks parties for authority why District Court's March 19, 1987 Order denying Summary Judgment is appealable.
April 24, 1987	-	Petitioners submit letter brief to first panel on the issue of the appealability of the District Court's denial of their Motion for Summary Judgment.
April 27, 1987	-	Respondent submits letter brief to first panel on the issue of the appealability of the District Court's denial of Defendants' Motion for Summary Judgment.
May 13, 1987	-	First panel "dismisses" Petitioners' Appeal.
May 18, 1987	-	Petitioners request clarification of basis for first panel's "dismissal".
May 28, 1987	-	First panel issues clarification.
June 11, 1987	-	Petitioners' Petition for Rehearing En Banc of first panel's decision.
June 23, 1987	-	District Court denies Petitioners' Motion for Reconsideration of District Court's denial of their Motion for Summary Judgment (see March 30, 1987).

June 30, 1987	-	Petitioners file Notice of Appeal #2.
July 1, 1987	-	Court of Appeals denies Defendants' Petition for Rehearing En Banc of first panel's decision on Appeal #1.
February 8, 1988	-	Second panel reverses District Court's denial of Petitioner Copeland's Motion for Summary Judgment.
February 22, 1988	-	Respondent's Petition for Rehearing En Banc of second panel's decision.
March 31, 1988	-	Court of Appeals orders rehearing en banc and vacates second panel's decision.
June 28, 1988	-	Court of Appeals en banc dismisses Petitioners' appeal.

The preceding chronology indicates quite clearly that, contrary to the doctrine of the "law of the case", Petitioners sought "two bites at the apple" on the issue of appellate jurisdiction. On their first Notice of Appeal, Petitioners sought review of the District Court's denial of their Motion for Summary Judgment. The first panel asked the parties for authority on the issue of appealability. After briefing on this issue, the first panel *dismissed* the appeal.

In response to a request for clarification, the first panel stated that "the appeal was dismissed as premature because the district court found that material facts were in dispute as to Copeland's immunity defense." *It is clear that the first panel considered the issue of appellate jurisdiction and, having considered this issue, dismissed the first*

appeal. Petitioners then sought, but were denied, rehearing en banc of the first panel's decision.

It is at this point that Petitioners sought a second bite at the apple of appellate jurisdiction. Prior to filing their first Notice of Appeal, Petitioners had moved in the District Court for reconsideration of the District Court's denial of Petitioners' Motion for Summary Judgment. After the first panel dismissed Petitioners' first appeal, the District Court denied Petitioners' Motion for Reconsideration. Petitioners then filed a second Notice of Appeal, in which they sought review of the District Court's denial of their Motion for Reconsideration. This second appeal was assigned to a second (and different) panel of the Court of Appeals. Although Respondent argued to the second panel that the first panel had already concluded (in dismissing the first appeal) that the District Court's denial of the Petitioners' Motion for Summary Judgment was not appealable, the second panel nevertheless proceeded to re-examine the issue of appellate jurisdiction contrary to the doctrine of the "law of the case". The first panel's decision that appellate jurisdiction was lacking was never appealed by Petitioners to the Supreme Court of the United States.

Before the Court of Appeals en banc, Respondent argued again that the issue of appealability had been resolved by the first panel and that the Court of Appeals en banc should, under the doctrine of the "law of the case", conclude that the decision of the first panel governed the issue of appealability. The Court of Appeals en banc addressed the issue of appellate jurisdiction *de novo*, and held, as did the first panel, that the Petitioners' appeal of the District Court's denial of the Petitioners'

Motion for Summary Judgment should be dismissed for lack of appellate jurisdiction. *W.D.D., Inc. v. Thornbury Township and John G. Copeland, Jr.*, 839 F.2d 151 (3rd Cir. 1988) vacated en banc, 850 F.2d 170 (3d Cir. 1988).

From the substance of the Petitioners' argument, it appears that the Petitioners are addressing the question of whether the Court of Appeals en banc properly dismissed the second appeal under the "law of the case" doctrine. The Court of Appeals en banc did not, however, base its holding on "law of the case" doctrine, but rather considered *de novo* the issue of appellate jurisdiction.

Respondent argued before the Court en banc, and continues to believe that the Court en banc did not have to reach the merits of the issue of appellate jurisdiction and could have concluded that the first panel's decision dismissing the first appeal was the "law of the case" and that Petitioners, in filing the second appeal, were improperly (i.e., contrary to the doctrine of the "law of the case") seeking to have a second panel reconsider the decision of the first panel.

"Law of the case", as applied to the effect of previous decisions on the latter action of the Court rendering them in the same cases, expresses the practice of courts to refuse to reopen that which has already been decided. *King v. W. Virginia*, 216 U.S. 92 (1910). In the instant case, there is no doubt that the first panel considered the issue of appellate jurisdiction and decided that appellate jurisdiction was lacking. The first panel raised the issue of appellate jurisdiction and, after giving the parties an opportunity to submit briefs on this issue, *dismissed* the

appeal. The "law of the case" doctrine should be applied to the decision of the first panel because, if it were not, the Court would be extending an open invitation to multiple appeals on the same issue. All unsuccessful parties would be encouraged to do what the Petitioners have done in the present case. After losing on the motion in the District Court, the losing party could simultaneously file a motion for reconsideration in the District Court and a notice of appeal. If the party loses the appeal, it could simply resurrect the previously filed motion for reconsideration (held in suspension while the appeal was pending) and, upon denial of the motion for reconsideration, file a second appeal. Clearly, the Court does not wish to encourage such a practice. Since the filing of a motion for reconsideration of a denial of a motion for summary judgment does not suspend the time for filing a notice of appeal, it was incumbent upon Petitioners' counsel to file the first Notice of Appeal within thirty (30) days of the District Court's denial of their Motion for Summary Judgment. Respondent's point is, quite simply, that once Petitioners filed and prosecuted their appeal and received a determination that the District Court's denial of their Motion for Summary Judgment was not appealable, they could not then seek a *second* determination of that same issue by filing a second Notice of Appeal from the District Court's denial of their Motion for Reconsideration.

Petitioners' only response to this argument is that the decision of the first panel was a "nullity" under the reasoning of *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982). They argue that "because the first appeal was filed during the pendency of a timely

Rule 59 Motion, the first appeal was a nullity, and its filing and disposition could have no effect on the second appeal." (Pet. for Cert., pp. 9-10).

Petitioners misread *Griggs* and Federal Rule of Appellate Procedure 4(a)(4) which *Griggs* interprets. Rule 4(a)(4) provides as follows:

> If a timely Motion under the Federal Rules of Civil Procedure is filed in the District Court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of judgment would be required if the Motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such Motion. A Notice of Appeal filed before the disposition of any of the above Motions shall have no effect. A new Notice of Appeal must be filed within the prescribed time measured from the entry of the order disposing of the Motion as provided above. No additional fees shall be required for such filing.

In *Griggs*, a District Court, after granting a motion for summary judgment, entered judgment in favor of the moving party. Thereafter, the losing party filed a timely motion to alter or amend the judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. While this motion was still pending, the losing party filed a notice of appeal. Thereafter, the District Court denied the losing party's Rule 59 motion. The United States Court of Appeals for the Third Circuit accepted appellate jurisdiction based upon the notice of appeal filed while the Rule 59 Motion was still pending. This Court concluded that the Court of Appeals had erred in that, under Federal

Rule of Appellate Procedure 4(a)(4), "a Notice of Appeal filed before the disposition [of a Rule 59 Motion] shall have no effect."

Griggs and Rule 4(a)(4) have no bearing on the first appeal filed in this case. It is clear from the language of Rule 4(a)(4) that the Rule is limited to the effect of a notice of appeal that is filed while a *post-judgment* motion is pending. Indeed, the first sentence of the Advisory Committee's comments to the 1979 amendments that added subdivision (a)(4) states that "the proposed amendment would make it clear that after the filing of *the specified post trial motions*, a notice of appeal should await disposition of the motion."

In this case, Petitioners filed a Motion for Reconsideration after the denial of their Motion for Summary Judgment. While this Motion was pending, they filed the first Notice of Appeal. This first Notice of Appeal was *not* a nullity nor did it become ineffective pursuant to Rule 4(a)(4) for the simple reason that a Motion for Reconsideration of a denial of a Motion for Summary Judgment is *not* one of the post-trial Motions mentioned in Rule 4(a)(4).[2] In short, the first appeal was *not* a nullity under Rule 4(a)(4) and it follows that the first panel's resolution of that appeal was also not a nullity. The first Notice of Appeal was effective and, under it, the first panel had jurisdiction to make the determination that there was not appellate jurisdiction to review the District Court's denial of Petitioners' Motion for Summary Judgment.

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[2] In their Petition for Certiorari, Petitioners refer to a number of lower court decisions that, according to Petitioners, support the proposition that "petitioners' motion for reconsideration of the order denying their motion for summary

(Continued on following page)

2. The Court Of Appeals Was Correct In Concluding That The Petitioner Township Had Failed To Claim The Immunity Defense In Its Motion for Summary Judgment Before The District Court.

The Court of Appeals en banc in its June 28, 1988 decision correctly noted that Petitioner Thornbury Township did not claim immunity from suit in the District Court and that its failure to raise the immunity defense, coupled with the fact that there has been no final judgment in the case, deprives the Court of Appeals of jurisdiction to now hear a claim of immunity by the Township for the first time. A federal appellate court does not consider an issue not passed upon below. *Singleton v. Wulff*, 428 U.S. 106 (1976); *Hormel v. Helvering*, 312 U.S. 552 (1941). In its Motion for Summary Judgment (reproduced in full at Appendix "D"), Thornbury Township did not raise an immunity defense. Thus, the June 28, 1988 Court of Appeals en banc decision is quite correct in noting that "Appellant Thornbury Township, however, does not claim immunity from suit."

(Continued from previous page)

judgment is properly treated as a Rule 59 motion" and therefore comes within Rule 4(a)(4) of the Federal Rules of Appellate Procedure. [Pet. for Cert., p. 9]. These cases are distinguishable since they all involve *post-judgment*, motions for reconsideration, which the courts, quite sensibly treat as the functional equivalent of a Rule 59 motion. *Richerson v. Jones*, 572 F.2d 89 [3rd Cir. 1978] (motion for reconsideration filed from District Court entry of summary judgment); *Sonnenblick – Goldman Corporation v. Nowalk*, 420 F.2d 858 (3rd Cir. 1970) [motion for reconsideration filed from District Court entry of summary judgment]; *Gainey v. Brotherhood of Railway and Steam Ship Clerks*, 303 F.2d 716 (3rd Cir. 1962) [motion for re-argument following District Court entry of summary judgment].

The only legal basis advanced by Petitioner Thornbury Township in support of its Motion for Summary Judgment before the District Court was that it was entitled to "an Order granting Summary Judgment pursuant to *MacDonald et al v. Yolo County,* 54 U.S.L.W. 4782 (1986)". Petitioners' sole argument before the District Court (fashioning a *MacDonald* defense) was that the zoning review process was incomplete at the time Respondent filed the instant Complaint thereby making it impossible for the District Court to determine what damages, if any, Respondent would incur when the final zoning decisions were made. The District Court clearly distinguished the instant claim from *MacDonald* and held:

> Defendants' reliance on *MacDonald* is, however, misplaced. *MacDonald* involved an alleged taking of property. Plaintiff W.D.D., however, has alleged a Section 1983 civil rights violation. Plaintiff is not attacking the regulation; rather, it is attacking the Township's and Copeland's opposition to Plaintiff's subdivision plan. (See March 19, 1987 District Court decision, Petitioner's Appendix, p.24A).

Just as the Petitioner Township failed to claim any purported right of immunity before the District Court in its Motion for Summary Judgment, the Township again failed to raise or argue any immunity defense in its Motion for Reconsideration. Although the Township slightly shifted its theory for relief in its Motion for Reconsideration, the Township still did not claim any type of qualified immunity from suit on its own behalf. Instead, as the Court of Appeals en banc properly noted, the Petitioner Township's entire argument was premised on the assertion that Respondent had failed to establish a

claim against the Township pursuant to applicable Section 1983 case law, in particular, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1968).

Thus, while Thornbury Township in both its Motion for Summary Judgment before the District Court and subsequent Motion for Reconsideration of the District Court's March 19, 1988 Order did raise the qualified immunity defense on behalf of the individual Petitioner Copeland, the Petitioner Township neglected to assert any type of immunity defense on its own behalf.

3. Supreme Court Review Of A Panel Decision Of The Third Circuit Court Of Appeals Which Has Been Specifically Vacated By That Court En Banc Is Inappropriate.

In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court conclusively held that a local government sued under 42 U.S.C. 1983 is *not* protected by any kind of official immunity even where the individual defendants might assert a qualified immunity claim. Petitioners now seek to have this Court reverse the *Owen* holding notwithstanding the fact that neither the District Court nor the Court of Appeals en banc found it necessary to address *Owen* in any fashion since the Petitioner Township failed to raise the qualified immunity defense previously rejected by *Owen*. Moreover, Petitioners' entire argument in this portion of their Petition (Pet. for Cert. pp. 13-17) asks the Supreme Court to review the correctness of the decision of the second panel which decision has already been *vacated* by the Court of Appeals!

Argument 3 of Petitioners' Petition for Writ of Certiorari states that:

> The merits panel's decision to dismiss the Township's appeal on the ground that the Township is not entitled to the same objective qualified immunity defense afforded to its official should be reviewed by this Honorable Court "because of the importance of the immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government." [Citation omitted].[3]

The argument advanced by Petitioners in this portion of their Petition is nonsensical in that the Court of Appeals en banc made *no such holding* in its decision of June 28, 1988, which is the decision before this Court for review. Petitioners' entire argument in this portion of their Petition erroneously refers to a prior three-judge panel decision of the Third Circuit dated February 8, 1988, which decision was immediately vacated by the Court of Appeals en banc in its Order of March 31, 1988. In effect, Petitioners' entire third argument to this Court is meritless since Petitioners are asking the Supreme Court to review a decision which has been vacated by the Court of Appeals.

In summary, the Court of Appeals en banc issued no decision either in support of or contradictory to this Court's holding in *Owen v. City of Independence, supra.* There was no need since the issue was never properly

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[3] On page 6 of Petitioners' Petition for Writ of Certiorari to this Court, Petitioner characterizes the three-judge panel of the Third Circuit Court of Appeals which rendered the vacated decision of February 8, 1988 as the "merits" panel.

raised by the Petitioner Township in its Motion for Summary Judgment.

It is somewhat ironic that on page 17 of the Petition for Writ of Certiorari, the Petitioners urge this Honorable Court to hear the instant appeal so that it can "deflect the confusion and disruptions created by the principle espoused by the lower court in this case." Respondent respectfully submits that any party who petitions this Court for certiorari review of a decision which the lower court has already vacated is itself responsible for any confusion and disruptions created in the case and should not attempt to shift that blame to the lower judiciary.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny Petitioners' request for a Writ of Certiorari and uphold the judgment of the Court of Appeals en banc.

Respectfully submitted,

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Date: September 16, 1988

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APPENDIX A

WDD, INC.	)	IN THE COURT OF
	)	COMMON PLEAS
vs.	)	CHESTER COUNTY,
	)	PENNSYLVANIA
THORNBURY TOWNSHIP	)	
BOARD OF	)	NO. 86-07758
SUPERVISORS	)	CIVIL ACTION – LAW

ORDER
(Filed July 13, 1987)

AND NOW, this 10th day of July, 1987, this court having sat *en banc* in plenary reconsideration of the arguments of the parties, we are persuaded that the decision in *McVay v. Zoning Hearing Board*[1] *of New Bethlehem Borough*, 91 Pa. Cmwlth. Ct. 287, 496 A. 2d 1328 (1985), in view of the uniquely egregious comportment of Supervisor Copeland in the circumstances[2] surrounding this case, impels the conclusion that his vote should have been and must be disqualified. Under the authority of *Consumers Education & Protective Association v. Schwartz*,

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[1] We are, of course, aware of the Zoning Hearing Board procedural context of *McVay* vis-a-vis the Board of Supervisors context at bar. But in view of the quasi-judicial capacity in which this case is being heard in the township [*see*: footnote 2 of the Opinion in this case, filed March 16, 1987, citing *National Bank of Chester Co. & Trust Co. v. East Whiteland Twp.*, 27 D&C 2d 384, 393, 10 Chester 454, 460 (1962)], we nevertheless find *McVay* controlling.

[2] We are well aware that supervisors, who are fundamentally legislators, and who exist, quite properly, in the political arena, have freedom of speech. We expressly limit the precedential effect of this decision to the extraordinary factual scenario at bar.

495 Pa. 10, 432 A. 2d 173 (1981), we thus invalidate the entire decision in this case. We decline, however, to indulge in the legal fiction that there was not a decision. There clearly was a decision (albeit ultimately determined to be a tainted decision), and it was timely communicated to the parties.

The matter is remanded to the Supervisors of Thornbury Township for another vote upon the underlying question.

BY THE COURT:
/s/ Robert S. Gawthrop
/s/ Lawrence Wood
/s/ J. Curtis Joyner

APPENDIX B

THORNBURY TOWNSHIP BOARD OF SUPERVISORS, Appellant	)	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	)	No. 1977 C.D. 1987
W.D.D., INC., Appellee	)	

BEFORE: HONORABLE DAVID W. CRAIG, Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE EMIL E. NARICK, Senior Judge

ARGUED: JUNE 13, 1988

OPINION BY JUDGE CRAIG FILED: August 22, 1988

The Thornbury Township Board of Supervisors appeals an order of the Court of Common Pleas of Chester County invalidating a vote of the supervisors on final approval of a subdivision plan of W.D.D., Inc. (WDD), because one of the supervisors, Mr. John Copeland, should have disqualified himself from voting, and remanding the case to the supervisors for a new vote.

The issue raised in this appeal is whether a member of the board of supervisors, who appears as a private individual, represented by counsel, before the township zoning hearing board to object to an application for variances for a proposed subdivision, may subsequently participate in the board's consideration of an application for final approval of that subdivision. Because, we conclude

that, under the facts of this case, Supervisor Copeland should not have participated in consideration of WDD's application for final subdivision approval, we affirm.

The facts of the case are undisputed. In 1985, WDD purchased a 164-acre tract of land in Thornbury Township and filed a preliminary subdivision plan with the township. The township planning commission members, then including Mr. John Copeland, reviewed the preliminary plan and recommended that the board not approve the subdivision plan.

In December 1985, the subdivision plan came before the board of supervisors, and the board suggested that WDD revise its plan to conserve approximately sixteen acres of woodland. Even though variances were necessary under the board's suggested plan, to comply with the Thornbury Township Zoning Ordinance, WDD modified its plan as suggested. On December 30, 1985, the supervisors passed a resolution directing WDD to proceed to the zoning hearing board to obtain the required variances, with assurance that the supervisors' body would support WDD in proceedings before the zoning hearing board.

In January 1986, Mr. Copeland became a member of the board of supervisors. In February 1986, the zoning hearing board conducted a hearing on WDD's application for the variances. Pursuant to the supervisors' resolution of December 30, 1985, two of the supervisors appeared at the hearing in their official capacity in support of WDD's application. The third supervisor, Mr. Copeland, appeared before the zoning hearing board as a private individual, represented by counsel, to oppose WDD's

application for the variances. Mr. Copeland's attorney cross-examined WDD's witnesses, and submitted a brief in opposition to WDD's application.

On April 3, 1986, the zoning hearing board granted the variances and the preliminary subdivision plan came before the supervisors for formal approval. On April 22, 1986, WDD received a letter from Supervisor Copeland, on official stationery, advising it that the board had disapproved its plan. However, the letter was not the result of any official supervisors' action; only Supervisor Copeland had signed the letter. As Supervisor Copeland stated in the letter, under section 508 of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10508(3), April 22, 1986 was the last day the board could render a decision rejecting the plan without the plan being deemed approved.[1]

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[1] Section 508 of the MPC provides:

> All applications for approval of a plat . . . whether preliminary or final, shall be acted upon by the governing body or the planning agency . . . but the governing body or the planning agency shall render its decision and communicate it to the applicant not later than ninety days . . . following the date the application is filed. . . .
>
> . . . .
>
> (3) Failure of the governing body or planning agency to render a decision and communicate it to the applicant within the time and in the manner required herein shall be deemed an approval of the application in terms as presented. . . .

53 P.S. §10508.

On May 21, 1986, on Supervisor Copeland's motion, the supervisors voted to have the township intervene in an appeal of the zoning hearing board's grant of variances brought by citizen-objectors.[2] The supervisors also formally voted to disapprove the preliminary subdivision plan.

On May 22, 1986, WDD filed a complaint in mandamus and a motion for peremptory judgment in the court of common pleas, requesting that, in accordance with the provisions of section 508 of the MPC, the supervisors be directed to approve its preliminary subdivision plan, and the trial court so ordered.

On July 7, 1986, WDD submitted its final subdivision plan to the supervisors for approval, the final plan being a refinement of the preliminary plan ordered approved by the court. On September 8, 1986, the supervisors met to vote on the final subdivision plan. Before the vote, WDD requested that Supervisor Copeland disqualify himself from voting due to personal prejudice and bias. Copeland refused, and, with Copeland in the majority, the supervisors voted 2 to 1 to approve the plan, but subject to conditions.

WDD appealed to the court of common pleas, asserting that the conditions attached to the approval were so onerous as to constitute a denial, and that the decision of

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[2] The court of common pleas reversed the zoning hearing board's granting of the variances. This court affirmed the decision of the court of common pleas in *Duling v. Zoning Hearing Board of Thornbury Township*, an unreported memorandum opinion at 2789 C.D. 1986, filed on September 14, 1987.

the supervisors should be vacated because of Supervisor Copeland's participation in the decision.

On July 10, 1987, the Chester County Court of Common Pleas vacated the September 8, 1986 vote which had granted conditional approval to the final subdivision plan of WDD, based on the refusal of Supervisor Copeland to disqualify himself from participating in the consideration of the plan. The trial court remanded the case for a new vote on the plan.

The supervisors contend that Copeland was not required to disqualify himself because he did not have any direct personal interest in WDD's application, distinct from that of the general public. There is no dispute that Copeland had no pecuniary interest in the application of WDD, nor is there any assertion that Copeland had any direct private interest in the application.

The supervisors cite *Levitt & Sons, Inc. v. Kane*, 4 Pa. Commonwealth Ct. 375, 285 A.2d 917 (1972). However, *Levitt* merely held that a supervisor who owns property in a zoning district that the board of supervisors is voting to rezone does not possess a disqualifying private interest. 4 Pa. Commonwealth Ct. at 382-84, 285 A.2d at 920-22.

Moreover, *Levitt* and other cases cited by the supervisors involved public officials acting in their legislative capacity. However, when a public official is acting in an adjudicative capacity, the specificity of the issue necessarily demands a more sensitive test as to disqualification.

This court noted the special standard required of a public official when functioning in an adjudicative capacity in *Davoub v. State Dental Counsel and Examining Board*, 70 Pa. Commonwealth Ct. 621, 625, 453 A.2d 751, 753 (1982):

> [A]dministrative tribunals must be unbiased and must avoid even the appearance of bias to be in accordance with the principles of due process. (Citation omitted.) In Schlesinger Appeal, 404 Pa. 584, 172 A.2d 835 (1961), the Supreme Court wrote:
>
> > 'Moreover, a predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process. Merely, "a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true" is sufficient.'
>
> 404 Pa. at 598, 172 A.2d at 841.

Thus the pivotal issue is whether the board of supervisors' vote on an application for final subdivision approval was a legislative act or an adjudicative one.

In *North Point Breeze Coalition v. Pittsburgh*, 60 Pa. Commonwealth Ct. 298, 431 A.2d 398 (1981), this court stated that, when an action of a governing body does not establish a rule of general application, but rather applies specific criteria to a single applicant and a single piece of property, the governing body is acting in its adjudicative capacity and not its legislative capacity.

In this case, the supervisors' decision as to WDD's application for subdivision approval was an action to administer planning and zoning ordinances already in existence. Moreover, consideration of WDD's application,

if approved, constituted an action granting WDD a privilege to subdivide and develop a specific tract of land. Thus, in deciding WDD's application for subdivision approval, the supervisors were acting in an adjudicative capacity.

McVay v. Zoning Hearing Board of New Bethlehem Borough, 91 Pa. Commonwealth Ct. 287, 496 A.2d 1328 (1985), concerned a member of a zoning hearing board and thus exemplifies the standard applied with respect to adjudicative officials. In *McVay*, a majority of the members of the borough zoning hearing board had signed a petition opposing the adoption of a zoning ordinance to rezone property for a low cost housing project. The borough council refused to rezone the property, and the landowner who had also applied for a special exception appeared before the zoning hearing board. The members who had signed the petition participated in the board's recognition of the request for a special exception. Under these facts, this court upheld the trial court's decision to vacate the board's rejection of the application for a special exception because of the zoning board members' bias.

In this case, the conduct of Supervisor Copeland evidenced a greater appearance of bias, if not actual bias, toward WDD's applicaton for subdivision approval than that shown in *McVay*. He personally appeared with counsel before the zoning hearing board to oppose WDD's application for variances. He sent a letter to WDD, indicating that the board rejected the preliminary application, when the board had not taken any official action on the application. The vote of the supervisors was therefore infirm.

Accordingly, we affirm the trial court's decision vacating the vote of the supervisors because of Mr. Copeland's bias and remanding the case to the board for another vote.

/s/ David W. Craig
DAVID W. CRAIG, Judge

THORNBURY TOWNSHIP BOARD OF SUPERVISORS, Appellant	)	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	)	No. 1977 C.D. 1987
W.D.D., INC., Appellee	)	

ORDER

NOW, August 22, 1988, the order of the Court of Common Pleas of Chester County, at No. 86-07258, dated July 10, 1987, is affirmed.

/s/ David W. Craig
DAVID W. CRAIG, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
AUG 22 1988

/s/ C.R. Hostutler
Deputy Prothonotary – Chief Clerk

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1382

W.D.D., Inc.

v.

THORNBURY TOWNSHIP, CHESTER COUNTY
and JOHN G. COPELAND, JR.
Appellants

ORDER

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and HUNTER,* *Circuit Judges*.

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

O R D E R E D that Opinion and Judgment of the court dated February 8, 1988 is hereby vacated, and that the Clerk of this court list the case for rehearing before the court in banc on May 10, 1988.

*As to panel rehearing only.

/s/ John J. Gibbons
Chief Judge

DATED: March 31, 1988.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

W.D.D., INC.	)	
v.	)	CIVIL ACTION
THORNBURY TOWNSHIP,	)	
CHESTER COUNTY, et al	)	NO. 86-03972

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. Defendants seek an Order granting summary judgment pursuant to *MacDonald v. Yolo County*, 54 U.S.L.W. 4782 (1986).

2. Defendant Copeland seeks an Order granting summary judgment pursuant to *Mitchell v. Forsyth*, 53 U.S.L.W. 4798, 105 Sup. Ct. 2806 (1985) and *Daniels v. Williams*, 106 Sup. Ct. 662 (1986) and *Davidson v. Cannon*, 106 Sup. Ct. 668 (1986).

3. Attached hereto and marked Exhibit "A" is a true and correct copy of this Court's Memorandum and Order of August 8, 1986.

4. Attached hereto and marked Exhibit "B" is a true and correct copy of Judge Gawthrup's Order of June 13, 1986.

5. Attached hereto and marked Exhibit "C" is a true and correct copy of the Memorandum and Order of the Honorable Charles B. Smith dated August 8, 1986.

6. Attached hereto and marked Exhibit "D" is an Affidavit prepared by Henry T. Zale, Esquire, Solicitor for Thornbury Township.

7. The chronology as set forth in the Affidavit of Henry T. Zale, Esquire is incorporated by reference and is restated in defendants' accompanying Memorandum of Law.

8. Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, defendants demand judgment in their favor together with costs and counsel fees.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

BY: /s/ Robert G. Hanna, Jr.
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